

Nos. 09-3416 &amp; 09-3469

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

<p><b>FILED</b> May 01, 2009 LEONARD GREEN, Clerk</p>
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JOHN DEMJANJUK,	)	
	)	
Petitioner,	)	
	)	
v.	)	<u>O R D E R</u>
	)	
ERIC H. HOLDER, JR., Attorney General,	)	
	)	
Respondent.	)	

Before: KENNEDY, GIBBONS, and ROGERS, Circuit Judges.

On April 14, 2009, the petitioner filed a petition for review of an order of the Board of Immigration Appeals (the “BIA”) that denied his motion to stay his removal to Germany pending consideration of a motion to reopen removal proceedings. (Case No. 09-3416). The petitioner requested a stay of removal pending review, and in the alternative, a stay pending this court’s review of the BIA’s order should it reject his motion to reopen while his appeal was pending. In light of the government’s stated desire to remove the petitioner later that day, the court issued a stay of removal pending further consideration of the matters raised by the petition.<sup>1</sup>

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<sup>1</sup>The government characterizes the petitioner’s application as a “mad scramble” undertaken hours before his scheduled removal. It suggested that the petitioner took no action between the time the Immigration Judge lifted a stay on April 8 and his April 14 application to this court. In fact, the petitioner asked the BIA for a stay on April 7, and the BIA denied the request on April 10. The petitioner also inquired of the government as to whether it planned to remove the petitioner prior to the BIA’s ruling and received an uncooperative and uninformative response on April 13. Any “mad scramble” resulted from the government’s refusal to give the petitioner’s counsel any timing information. The government’s opposition to the stay motion, moreover, omitted any reason for immediate removal. The overall course of conduct by the government in effect meant that granting the stay initially was the only way this court could give thoughtful consideration to the petitioner’s claims.

Nos. 09-3416 &amp; 09-3469

- 2 -

On April 15, 2009, the BIA denied the petitioner's motion to reopen. The government moves to dismiss Case No. 09-3416 as moot in light of the BIA's April 15 decision. The petitioner does not oppose the motion to dismiss. The relief sought by the petitioner was a stay of removal pending the BIA's consideration of his motion to reopen. The BIA has now decided that motion, and there is no effective relief that can be granted by the court. The petition for review in Case No. 09-3416 is moot. *See Operation King's Dream v. Connerly*, 501 F.3d 584, 591 (6th Cir. 2007).

In Case No. 09-3469, the petitioner seeks review of the BIA's denial of his motion to reopen. He moves for leave to proceed *in forma pauperis* and for a stay of removal. The government opposes the motion for a stay.

The court has the discretion to grant a stay of removal pending consideration of a petition for review. *See* 8 U.S.C. § 1252(b)(3)(B). In ruling on a motion for a stay, the court applies the traditional four-part test governing injunctive relief. *Nken v. Holder*, No. 08-681, 2009 WL 1065976, at \*11 (U.S. Apr. 22, 2009); *Nwakanma v. Ashcroft*, 352 F.3d 325, 327 (6th Cir. 2003). A petitioner seeking a stay of removal has the burden of demonstrating that a stay is warranted. The first two stay factors, the petitioner's likelihood of success on the merits and irreparable harm, "are the most critical." *Nken*, 2009 WL 1065976, at \*11. The likelihood of success shown must be "better than negligible" and "more than a mere possibility." *Id.* (internal citations and quotations omitted). A petitioner must also demonstrate more than a possibility of irreparable harm. *Id.* The final two stay factors, the harm to others and the public interest, "merge when the Government is the opposing party." *Nken*, 2009 WL 1065976, at \*12.

The petitioner sought to reopen his removal proceedings before the BIA to apply for deferral of removal to Germany under the Convention Against Torture ("CAT"). CAT precludes the forcible return of a person to a country where there are "substantial grounds for believing that he would be

in danger of being subjected to torture.” *Filja v. Gonzales*, 447 F.3d 241, 256 (3d Cir. 2006); *see Almuhtaseb v. Gonzales*, 453 F.3d 743, 749 (6th Cir. 2006). In seeking reopening, the petitioner was required to demonstrate *prima facie* eligibility for deferral of removal. *See INS v. Abudu*, 485 U.S. 94, 104-08(1988); *Ahmed v. Mukasey*, 519 F.3d 579, 585 (6th Cir. 2008); *Alizoti v. Gonzales*, 477 F.3d 448, 451-52 (6th Cir. 2007). The BIA found that the petitioner failed to submit sufficient evidence demonstrating that he will be subjected to torture in Germany. Before this court, the petitioner has not shown a strong or substantial likelihood of success on the merits of his challenge to this finding by the BIA or to the denial of his motion to reopen. At most, he has offered speculation that German authorities may not adequately attend to his medical needs while he is in that country’s custody.

The petitioner also argues that he will suffer irreparable harm amounting to torture while he is being transported to Germany. The government asserts that 8 U.S.C. § 1252(g) precludes judicial review of the decision that the petitioner’s medical condition is sufficient to undergo removal to Germany. The petitioner’s medical condition is relevant, however, in evaluating irreparable harm. Based on the medical information before the court and the government’s representations about the conditions under which it will transport the petitioner, which include an aircraft equipped as a medical air ambulance and attendance by medical personnel, the court cannot find that the petitioner’s removal to Germany is likely to cause irreparable harm sufficient to warrant a stay of removal.

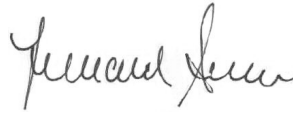
In Case No. 09-3416, the government’s motion to dismiss as moot is **GRANTED**. The April 14 order granting a stay of removal is **VACATED**, the petitioner’s motion to unseal the medical report filed by the government is **GRANTED**, and all other pending motions are **DENIED** as moot.

Nos. 09-3416 & 09-3469

- 4 -

In Case No. 09-3469, the petitioner's motion for leave to proceed *in forma pauperis* is **GRANTED**. His motion for a stay of removal pending review is **DENIED**.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Leonard Green", written in a cursive style.

Leonard Green  
Clerk